IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No._____.

COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, - - - - - - - *Petitioner,*

v.

A. M. ANDERSON, RECEIVER, NATIONAL BANK OF KENTUCKY, AND NATIONAL BANK OF KENTUCKY, - - - *Respondents.*

PETITIONER'S BRIEF ON PETITION FOR WRIT OF CERTIORARI.

OPINIONS AND DECREES BELOW.

The opinion and decree of the Circuit Court of Appeals for the Sixth Circuit reversing the District Court were rendered April 12, 1940 (Vol. II, R. 130-138 and R. 129 respectively), reported 110 F. (2d) 961.

The action was tried in the District Court for the Western District of Kentucky at Louisville, Judge Elwood Hamilton (now of the Sixth Circuit) then presiding. His opinion, filed July 21, 1937, is found in the record (Vol. I, R. 72-88) and reported 20 F. S. 217.

The decree was entered in the District Court October 9, 1937, and is found in the record (Vol. I, R. 100-108).

JURISDICTION.

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240a of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347a, 43 Stat. 938).

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

In rejecting the set-off the Circuit Court of Appeals has rendered a decision:

a. In conflict with applicable decisions of this Court upon a Federal question.

b. In conflict with the decisions of other Circuit Courts of Appeals on the same matter.

c. In a way probably in conflict with the decisions of the Court of Appeals of Kentucky.

d. In conflict with its own previous decisions creating confusion in the Circuit.

e. In which it has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

f. Which involves principles, the settlement of which is important to the public.

CONCISE STATEMENT.

In view of the summary statement shown in the foregoing petition (pp. 2-4), in the interest of brevity, same is not repeated here, and the Court is referred thereto, it being adopted as a part hereof.

THE ULTIMATE QUESTION.

Is the Commissioners of the Sinking Fund of the City of Louisville entitled to set-off, as against its deposits, the value of the City of Louisville bonds owned by the Bank, when it failed, or some part thereof?

Incidental and component questions are reflected in Specification of Errors.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Sixth Circuit erred:

1. In rejecting the set-off.
2. In holding that the allowance of the set-off would result in an unfair distribution of the Bank's assets among its creditors.
3. In holding that as the bonds were unmatured at the date of insolvency, this prevented their use by way of set-off.
4. In holding that there was lack of mutuality and in holding that mutuality or interdependency or relation, was necessary.
5. In holding that our right of set-off was predicated on the redemption of the bonds, and in failing to distinguish between the equitable right of set-off and the value thereof.
6. In finding that practically all the bonds were pledged on the date on which the District Court adjudged that the Commissioners were entitled to their surrender, and that, therefore, set-off could not be allowed.

7. In finding that when the Bank closed, its City of Louisville bonds were selling above par.

8. In assumptions not supported by the record and not made the basis of findings of fact in the District Court.

9. In assumptions not based on findings of fact in the District Court.

10. In holding that the Commissioners did not in reality assert a right to set-off.

11. In holding that what the Commissioners sought is a forced sale to them of the bonds, selling above par.

12. In finding that the Receiver reacquired the pledged bonds with money that was a part of the Bank's general assets, and in holding that the bonds bear the character of general assets.

SUMMARY OF ARGUMENT.

The Commissioners of the Sinking Fund of the City of Louisville is entitled to set-off against its deposits in the National Bank of Kentucky, aggregating $858,952.48 when it closed, the sum of $169,200.00, being the par value of City of Louisville bonds owned by the Bank when it became insolvent, or some part thereof.

Insolvency of the party against whom a set-off is claimed is sufficient ground for equitable jurisdiction and interference.

Equitable set-off is allowed whether the demands arise out of the same or wholly disconnected or independent transactions, whether liquidated or unliquidated, and even though obligation to insolvent has not matured.

These principles apply against an insolvent National Bank and no preference or unfair distribution is thereby created, as it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent.

Where insolvency has intervened, equity has extended the right to an unmatured note, upon the theory that in good conscience one ought not to be required to pay a debt to his creditor, if he cannot ultimately compel the creditor to pay a debt due him, even where strict mutuality is lacking.

Our equitable right of set-off existed upon the closing of the Bank. Such equity was subject to the then existing equity of $58,057.71 in favor of the Federal Government on account of the pledge; the subsequent redemption of the bonds merely made our equity more valuable.

Commissioners of the Sinking Fund of the City of Louisville is the City of Louisville.

ARGUMENT.

In the Appellate Court the Bank contended, *inter alia*, that the set-off should not be allowed, because:

1. Allowance thereof would constitute a preference resulting in an unfair distribution of the Bank's assets among its creditors.
2. The bonds had not matured.
3. There was no relation between the deposits and the bonded indebtedness; in other words that set-off does not exist where the transactions are independent.
4. Nearly all the bonds were pledged when the Bank closed.

Keeping these points of the Circuit Court of Appeals and the Bank in mind, the Court will please notice, as we pass from case to case, how aptly they overcome the position of the Circuit Court of Appeals and the Bank.

In *Scammon* v. *Kimball*, 92 U. S. 362, this Court held that a private banker having insurance in a company rendered insolvent by the Chicago fire, by which the banker's insured property was consumed with the rest, had a right to set-off the amount of his insurance against money of the insurance company in his hands on deposit, although the insurance was not due at the time of the insolvency, becoming due afterwards, when the banker had performed all the conditions required by the insurance company in the premises. It is to be noted that there, there was absolutely no relation between the deposit and the insurance, the obligations were definitely independent, the one of the other, and this Court says (p. 367):

> "Whether the suit be one at law or in equity, set-off must be understood as that right which exists be-

> tween two parties, each of whom, under an independent contract, owes an ascertained amount to the other, to set-off their respective debts by way of mutual deduction, so that, in any action brought for the larger debt, the residue only, after such deduction, shall be recovered."

In *Carr* v. *Hamilton*, 129 U. S. 252, in a suit by an insolvent insurance company to foreclose and sell mortgaged property, the insured was decreed a set-off for the reserve value of the policy, and therein this Court said (pp. 255-256):

> "Natural justice and equity would seem to dictate that the demands of parties mutually indebted should be set-off against each other, and that the balance only should be considered as due. But the common law, for simplicity of procedure, determined otherwise, and held that each claim must be prosecuted separately. 'The natural sense of mankind,' says Lord Mansfield, 'was first shocked at this in the case of bankrupts, and it was provided for by 4 Anne C. 17, Section 11, and 5 Geo. II, C. 30, Section 28.' Green v. Farmer, 4 Burr. 2220, cited in 2 Story Eq. Jur., Section 1433. In pursuance of these old statutes, and of the dictates of equity, the principle of set-off between mutual debts and credits has for nearly two centuries past been adopted in the English bankrupt laws, and has always prevailed in our own whenever we have had such a law in force on our statute book; and it mattered not whether the debt was due at the time of bankruptcy or not."

In *Scott* v. *Armstrong*, 146 U. S. 499, the affairs of an insolvent national bank were in liquidation through receiver, and a question of set-off was involved. The litigation reached the Circuit Court of Appeals for the Sixth Circuit, which certified certain questions to this Court as

to the law. The first question was (and this is a very controlling question here) (p. 502):

> "Where a national bank becomes insolvent and its assets pass into the hands of a receiver appointed by the Comptroller of the Currency, can a debtor of the Bank set-off against his indebtedness the amount of a claim he holds against the Bank, supposing the debt due from the Bank to have been payable at the time of its suspension, but that due to it to have been payable at a time subsequent thereto?"

The answer was "Yes" and set-off was allowed. This Court said, among other things (p. 507):

> "The note in controversy did not mature until September 7, 1887, but the deposit to the credit of the Farmers' Bank was due for the purposes of suit upon the closing of the Fidelity Bank, as under such circumstances no demand was necessary. The receiver took the assets of the fidelity bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached.
>
> "The right to assert set-off at law is of statutory creation, but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject."

In this decision this Court construes Revised Statutes, Section 5234 (12 U. S. C. A., Section 192), Revised Statutes, Section 5236 (12 U. S. C. A., Section 194), Revised Statutes, Section 5242 (12 U. S. C. A., Section 91) (Appendix 32-33), inhibiting preferences in distribution of assets of insolvent national banks, and says they do not destroy

liens or equities, and what passes as assets to the Receiver is the net balance after the equity is allowed; that the allowance of a valid set-off is not a preference. The language of the Court is (p. 510):

> "Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent.
>
> "The requirements as to ratable dividends, is to make them from what belongs to the Bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the Bank."

In *North Chicago Rolling Mills Co.* v. *St. Louis Ore & Steel Co.*, 152 U. S. 596, this Court upheld the equitable right of set-off on an unliquidated demand based on a contract in existence at the time the additional proceedings were instituted.

In rejecting the decision of the lower Court to the effect that the unliquidated damages could not be the subject of set-off in equity any more than in law, and that the claim arose out of transactions distinct from the subject-matter of the suit in which a set-off had been claimed, this Court says (p. 614):

> "The material thing is that the contract (for the breach of which the claim for damages arises) was in existence when the garnishment process was served."

Dissipating the idea that there must be some dependency of the one demand upon the other, and the idea that there must be some connection between the two demands, this Court says (pp. 615, 616):

> "Cross demands and counterclaims, whether arising out of the same or wholly disconnected transac-

tions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice."

* * * * * * * *

"By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference."

This decision completely answers most of the contentions of the Bank here on its claim of lack of mutuality and the conclusions of the Circuit Court of Appeals.

In the case at bar the contract of the City to pay the Bank the bonds was in existence at the time the Bank closed; that the obligation of the City was not then due is not material.

The several points of law so decided by this Court have been followed by a number of decisions in the various Circuit Courts of Appeals.

In *Sinclair Refining Co.* v. *Midland Oil Company*, 55 Fed. (2d) 42 (C. C. A. 4) the right of set-off was refused because there was no insolvency of either of the parties. Therein the Court refers to the North Chicago case, *supra*, as the leading case in Federal Equity upon the subject of set-off where insolvency is involved, and subscribes to the principles therein to the effect that it is immaterial whether the cross demands arise out of the same or wholly disconnected transactions or whether liquidated or unliquidated, and that insolvency is a sufficient ground for equitable interference.

In *Gray, Receiver of Monongahela National Bank* v. *School Districts of the Burrough of Brownsville*, 67 Fed. (2d) 141 (C. C. A. 3) (certiorari denied 291 U. S. 660), is

found a case, the facts of which coincide with those at bar very closely; therein the District Court allowed the set-off, which was affirmed by the Circuit Court of Appeals. The Court cites the *Scammon, Scott* and *North Chicago* decisions of this Court, *supra,* and recognizes the well-established principle that insolvency of the party against whom a set-off is claimed is a recognized ground for equitable inquiry and on a proper showing for equitable interference.

In *Jennings* v. *Gary State Bank,* 74 Fed. (2d) 100 (C. C. A. 7) there was again involved a receiver for a national bank and a State bank, the latter of which sought to establish a set-off. The set-off claimed was allowed by the District Court, and in affirming same the Circuit Court of Appeals said (p. 101):

> "It makes no difference that the right of action of the closed Bank had not matured at the time said Bank was closed, if the set-off which is claimed was acquired before the closing of the Bank."

The case of *Scott* v. *Armstrong, supra,* is cited and quoted from, and following this, the Court subscribed to the doctrine that the allowance of the set-off could not be considered a preference, and that which at the time of insolvency belongs of right to the debtor, does not belong to the Bank.

In *First National Bank of Indianola, Ia.,* v. *Malone,* 76 Fed. (2d) 251 (C. C. A. 8), the Court was considering a question bearing upon the points which we have here, and in allowing the set-off, followed the decisions above cited from this Court and upheld the right of set-off of a deposit against the debt upon an unmatured note and where strict mutuality was lacking, the Court saying (p. 255):

> "The right of set-off in equity, against unmatured claims, even where strict mutuality is lacking, is based upon the Bank's insolvency.
>
> "Where insolvency has intervened, equity has extended the right to an unmatured note, upon the theory that in good conscience one ought not to be required to pay a debt to his creditor if he cannot ultimately compel the creditor to pay a debt due him."

The Court endorsed the principle that equitable set-off prevails whether the cross-demand arises out of the same or wholly disconnected transactions and whether liquidated or unliquidated.

In the instant opinion, the Circuit Court of Appeals says:

> "Practically all of the bonds in question were pledged to the United States on the date on which the District Court adjudged that the Commissioners were entitled to their surrender" (Vol. II, R. 136).

As this statement is used as a basis from which the Circuit Court of Appeals denies the set-off, that Court must have considered the finding as material. The assumption is not only unsupported, but is negatived, by the record, which shows that the bonds were sold in the fall of 1934 (Vol. I, R. 39-44); the opinion of the District Court was entered July 21, 1937 (Vol. I, R. 72-88); the decree of the District Court was entered October 9, 1937 (Vol. I, R. 100-108).

Another statement of the Court unsupported by the record is:

> "The Receiver has reacquired them with money that was a part of the Bank's general assets, and we think they should, in consequence, bear the character of general assets." (Vol. II, R. 136.)

The record is silent on the question with what money and just when the bonds were redeemed by the Receiver. The over-collateralization of $105,942.29 (the difference between the par value of the bonds pledged, $164,000.00, and the amount secured, $58,057.71) seems to refute the Court's conclusion about redemption from general assets. In any event general assets could not have been used in excess of $58,057.71 for redemption of the bonds. All the bonds involved, except $5,200.00 thereof, were pledged, when the Bank closed, and were thereafter redeemed by the Receiver and held by him free from any pledge agreement (Stipulation III, Vol. II, R. 91). Under the decisions of this Court, *supra,* our equitable right of set-off prevailed and attached to all the bonds upon the insolvency of the Bank, and this the Circuit Court of Appeals has ignored.

There is no pleading specifically relying upon this point; no request for finding of fact in regard thereto was made (Vol. I, R. 45-46, 47-48), nor is it mentioned by the Receiver in his reasons for conclusions of law requested relative to set-off (Vol. I, R. 56-57). The point is not mentioned in the opinion of the District Court (Vol. I, R. 72-88) and there is no finding of fact in regard thereto, nor exception thereon (Vol. I, R. 89-100).

In *Ellerbe* v. *Studebaker Corporation of America,* 21 Fed. (2d) 993 (C. C. A. 4), the situation was identically the same as here on the point just urged, and set-off was allowed, although the note was pledged at the time of the failure of the Bank and was subsequently redeemed by the Receiver; in passing upon that point the Circuit Court of Appeals said (p. 997):

> "and we do not think that it makes any difference that the note had been pledged to the Federal Reserve Bank

and was held by it as security at the time the Bank failed.

* * * * * * * *

Even though the note was held under a pledge at the time of the Bank's failure, as soon as it was redeemed by the Receiver it became subject in his hands to a set-off to the extent of the deposit standing to the credit of the maker upon the books of the Bank, just as though it had never been pledged." (Citing authorities.)

And the Court further says (pp. 997-998):

"The rule that the rights of the parties become fixed when the Bank closes its doors means that a debtor of the Bank cannot set-off a claim acquired after insolvency against a debt contracted before. It does not mean that he cannot set-off his deposit against a note owned by the Bank and collected by its Receiver merely because at the time of the Bank's failure, the note was held by another Bank to which it had been pledged as collateral."

We do not contend that a demand may be acquired after insolvency and claimed as a set-off. It cannot be. When the Bank closed, it owed us money, our deposits, and we were obligated to it on our bonds; our right of set-off existed then; it was subject to the then existing equity of $58,057.71 in favor of the Federal Government on account of the pledge; however, under the *Ellerbe* case, just cited, upon redemption, and consequent extinguishment of the pledge, and with it the equity of the Federal Government, our right of set-off remained without any intervening equity. The Court of Appeals takes the position that our right to set-off is based on redemption of the bonds, but such is not the case. The set-off existed upon the insolvency of the Bank; the subsequent redemption of the bonds

merely made our equity more valuable. The Court has failed to distinguish between the right of equitable set-off and the value thereof. *Dakin* v. *Bayly*, 290 U. S. 143, is cited, but it does not militate against our contention. The decision in our case on this point conflicts with that of the 4th Circuit in the *Ellerbe* case, and the latter is much better reasoned, being based on this Court's rulings.

From the foregoing decisions of the various Circuit Courts of Appeals, it appears that there is a decided conflict between them and the 6th Circuit on the points which we have here involved.

In support of its conclusion that the allowance of the set-off here claimed would result in an "unfair distribution of the Bank's assets among its creditors," the Circuit Court of Appeals has relied upon *Springfield National Bank* v. *American Surety Company*, 7 F. (2d) 44 (C. C. A. 6), which in turn was predicated upon *U. S. Fidelity & Guaranty Co.* v. *Wooldridge, Receiver*, 268 U. S. 234. Neither touches the case at bar, top, side nor bottom. The facts are entirely different from those here. In the *Wooldridge* case the Railway Company was the depositor, the Guaranty Company had executed to it a depository bond; the Guaranty Company had also executed a fidelity bond to the Bank guarding against frauds of the President. The Bank became insolvent through the frauds of the President and closed its doors. The Guaranty Company paid the Railway Company the latter's deposits and took an assignment from the Railway Company. The Receiver of the Bank sued the Guaranty Company on the fidelity bond and the Guaranty Company endeavored unsuccessfully to set-off by subrogation or assignment the amount it had paid the Railway Company. The case furnishes a

splendid example of what this Court means by independent transactions. The lower courts gave judgment for the Receiver on the fidelity bond, and this was affirmed by this Court. All the courts recognized that the Guaranty Company, after the insolvency of the Bank, could not have bought a claim against the Bank and used it in set-off. This is a well established rule. This Court very properly inquired as to what the right of the Railway Company was, and it was perfectly clear that its right was only to share with other unsecured creditors in the assets of the Bank, of which the fidelity bond there in suit was a part. The Railway Company could never have urged the right to set-off its deposits as against the fidelity bond, or any set-off, as it owed the Bank nothing to be set-off. This Court further says that if the Railway Company had insured the honesty of the Bank's officers, the Bank might have off-set such obligation of the Company against its claim as a depositor.

In the case at bar, we have no such state of facts as presented in the *Wooldridge* case. Here the contest is strictly between a depositor and the Bank, each indebted to the other. At the date of insolvency, the Commissioners had on deposit with the Bank deposits aggregating $858,-000.00 plus, for which the Bank was indebted to it. The Bank owned the bonds of the City, which had to be paid through the Commissioners, and the Commissioners' deposits in the Bank were for the purpose of paying the City's obligations evidenced by its bonds. The bonds were a direct charge on the assets of the Commissioners. Several of the accounts covered segregated deposits allocated to pay some of the very identical issue of bonds that the Bank owned, as follows:

CITY OF LOUISVILLE BONDS.

Owned by Bank—Par Value	Series	Commissioners' Deposits
$20,000.00	Hospital 4½%	$41,002.36
25,000.00	Sewer 4% due 1947	58,930.91
5,200.00	School Imp. 5% dated 1922	84,954.71
(F. F., Vol. I, R. 93)		(F. F., Vol. I, R. 90)

There was also a deposit of the Commissioners shown in the General Fund Account of $166,275.99 (F. F., Vol. I, R. 90), to be ultimately used for the payment of City bonds. Had our deposits been less than the value of the bonds, can it be doubted that the deposits would have been set-off against our bonded indebtedness to the Bank, pledge or no pledge? The controlling facts in the case of *Springfield National Bank* v. *American Surety Company*, 7 Fed. (2d) 44 (C. C. A. 6), so far as we are able to determine, are on all fours with the *Wooldridge* case just discussed, and so are within the ruling thereof, as said by the Appellate Court therein. From the facts which we have just related, that appear in the case at bar, it is evident that the "lack of contact" in the *Springfield* case, does not exist here; there is considerable "color of connection" here between the deposits of the Commissioners and the bonds held and owned by the Bank.

To allow us the set-off contended for here would not eventuate in an unfair distribution of the Bank's assets among its creditors, because the Bank's assets in our case is the balance between the aggregate of our deposits and the value of the bonds, making the Bank here, in the wash-out, our debtor,—and so no assets of the Bank are involved, as was held in *Scott* v. *Armstrong*, 146 U. S. 499, and *Jennings* v. *Gary, Indiana State Bank*, 74 Fed. (2d) 100, ***supra.***

It seems to us that in reaching its decision, the Circuit Court of Appeals treats the set-off as one at law and not in equity, and has utterly ignored the distinction between legal and equitable set-off, established in the decisions upon which we rely.

The Circuit Court of Appeals contends that as the bonds were unmatured at the date of insolvency, this fact has been held by some courts to prevent their use by way of set-off, citing in support *Armstrong, Receiver,* v. *Helm,* 13 Ky. L. R. 460. This is what is known in Kentucky as an abstract opinion, and therefrom it cannot be ascertained just what the controlling facts were, although it would appear that a third person, a surety, was urging the set-off of his principal's deposits, which is not the situation here; apparently so much thereof as is referred to by the Appellate Court here is dicta. The *Helm* opinion is one handed down by an intermediate court, the Superior Court of Kentucky, abolished shortly thereafter. It was not a court of last resort and appeals were permissible therefrom to the Court of Appeals of Kentucky; on the point referred to by the Appellate Court here, the Helm decision appears to conflict with one rendered by the Court of Appeals of Kentucky, in *Kentucky Flour Co., Assignee* v. *Merchants National Bank,* 90 Ky. 225, wherein the Court held in effect that where an insolvent debtor who makes an assignment for the benefit of creditors is indebted to a bank with which he has money on deposit, the Bank may apply the deposits as a credit on its debt, although the debt had not matured at the time the assignment was made,—the right of equitable set-off due to insolvency existing; that such did not result in inequitable distribution. The Helm decision by the Superior

Court of Kentucky was rendered before the decision of this Court in *Scott* v. *Armstrong,* 146 U. S. 499, *supra.*

In denying set-off here, the Circuit Court of Appeals is flying in the teeth of the decisions of this Court, of the courts of various circuit courts of appeals, of the Court of Appeals of Kentucky, and its own previous decisions.

In *Central Appalachian Co.* v. *Buchanan,* 90 Fed. 454, the Circuit Court of Appeals for the Sixth Circuit sustained the claim for set-off although based on unliquidated damages, holding: That the claim was unliquidated was no objection to set-off in a court of equity, if insolvency exists; that it was no objection that the claim asserted had not arisen when the Receiver was appointed, nor when he recovered his judgment, it being sufficient that the contract under which the set-off arose was in existence when the Receiver was appointed, the Court stating further that it would seem that under the law of Kentucky, there was a statutory right of set-off existing in respect to all demands arising out of contract, regardless of mutuality of credit, nor was equitable right of set-off limited to credits strictly mutual, if insolvency exist.

Geo. D. Harter Bank v. *Inglis,* 6 Fed. (2d) 841, was decided by the United States Circuit Court of Appeals (6) (certiorari denied, 269 U. S. 576), and the first question was whether the Harter Bank had the right to set-off the deposits against the unmatured note owing it. The right of set-off was sustained by the District Court and affirmed by the Circuit Court of Appeals (6), holding (p. 843):

> "Where insolvency has intervened, equity has extended the right to an unmatured note, upon the theory that in good conscience one ought not to be

required to pay a debt to his creditor, if he cannot ultimately compel the creditor to pay a debt due him."

The instant decision of the Circuit Court of Appeals is based upon a further misconception of facts as shown by this record, in finding that when the Bank closed, the bonds were selling above par (Vol. II, R. 132-133). It is fair to presume that the Bank in its shaky financial condition was making every endeavor to bolster up the value of its assets, —was in position to know the value of the bonds at the time of its insolvency,—that it was carrying the bonds in its assets at the highest possible market value then obtainable,—and upon examining the record, we find (Vol. II, R. 46, Ex. 13, offered Depo., Zurschmiede, R. 45) that the Bank was carrying these bonds in their investment ledger sheets at a book value of $147,910.00, excluding the $5,200.00 School Improvement Bonds, making the total value of bonds at the time of insolvency at the Bank's own valuation $153,110.00, against which we seek to set-off deposits to the extent of $169,200.00, a loss to the Commissioners of about $16,090.00; we do not profit by the allowance of the set-off, as contended by the Bank.

In view of the record, we do not agree with the Circuit Court of Appeals, nor the Bank as urged by it, that we have not in reality asserted a right of set-off. Had the set-off been allowed by the Bank and the bonds surrendered to us, it is fair to presume that they would have been cancelled, otherwise we would be in the absurd position of holding our own bonds and out of one pocket paying the interest thereon as it became due, and putting it right back in our other pocket; which would appear to be a work of supererogation. So far as having any bearing upon the law of this case, there is no distinction between

ordinary notes, city warrants, certificates of indebtedness, and city bonds; they are all written evidence of indebtedness; the bonds, on account of its security, being of a more glorified nature.

It is customary to deliver an obligation to a debtor when paid. Our right to acquire our bonds and apply the sinking fund thereon is given by Ky. Stat. 3010-9 (App., p. 32).

It is contended by the Bank that there is lack of mutuality because the deposits were in the name of the Commissioners of the Sinking Fund, whereas the bonds were the obligation of the City of Louisville, and that they are two different persons. The Appellate Court did not discuss the point. Commissioners of the Sinking Fund of the City of Louisville is the City of Louisville (Kentucky Statutes 3010-1, Appendix, p. 31); its deposits are the funds of the City of Louisville. The Sinking Fund is under the control and management of the Commissioners of the Sinking Fund, and shall be held and sacredly used for the payment of the principal and interest of the bonded debt of the City (Kentucky Statutes 3010-8, Appendix, p. 31). The Commissioners of the Sinking Fund of the City of Louisville has quasi public powers; it has but one function, and that is to gather in and conserve the funds of the City of Louisville for the purpose of meeting the bonded indebtedness of the City of Louisville, including the interest thereon. The Commissioners of the Sinking Fund has no capital stock and no stockholders, as in the case of private corporations. The bonds of the City which were owned by the Bank when it closed, were each issued under an ordinance of the City, made a charge on the Sinking Fund, and a tax levied to pay the principal and

interest (Ex. 24 to 29, inc., Vol. II, R. 73-90, offered Stipulation, Vol. II, R. 65-66). Upon referring to Exhibit 30 (Vol. II, R. 92-93, offered with Supplementary Stipulation of Fact, Vol. II, R. 91), the Court will find a copy of one of the bonds, the pertinent provisions of which read:

> "The City of Louisville, for value received, hereby promises to pay * * *
>
> "These bonds are exempt from all forms of taxation for municipal purposes of the City of Louisville, and are a charge upon the Sinking Fund of said City, and a tax is levied on all the property subject to municipal taxation in the City of Louisville sufficient to pay the principal and interest of said bonds and ordered to be annually collected and paid into the Sinking Fund of the City of Louisville to be used alone for the payment of said principal and interest."

Inasmuch as there are many national banks at this time throughout the country in receivership, and the principles herein involved may arise in various jurisdictions, the questions here urged are not only of interest and importance to the parties to this cause, but to many insolvent national banks now in receivership and their many depositors.

CONCLUSION.

The petition for review on writ of certiorari should be granted.

Respectfully submitted,

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